TBIC INVESTMENTS (PRIVATE) LTD
and
PAUL ESAU HUPENYU CHIDAWANYIKA
versus
SHERIFF FOR ZIMBABWE
and
KENNEDY GODWIN MANGENJE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 June 2018 & 11 July 2018

Urgent Chamber Application

K Kachambwa , for the applicant
E Jera, for the respondent

TSANGA J: The applicants sought a provisional interdict which I dismissed with costs on a higher scale on 7 June. Reasons for so doing have been requested in writing for purposes of appeal.

The interdict sought was to effectively stop a removal and eviction in terms of a writ of ejectment issued out on 29 May 2018.

Background

A portion of land situated in Goromonzi district which was inherited by one Cecil Michael Reimer from his father was awarded to the second respondent, Godwin Mangenje in 2006. This was in terms of an offer letter under the land resettlement programme. Under murky circumstances, a portion of that land had been sold by Cecil Reimer to the applicants in 2009 at a time when it had already been acquired by the state for resettlement. When the applicants refused to vacate the land, Kennedy Godwin Mangenje had sought the eviction of the applicant from the land allotted to him. The High Court having found in his favour in case No. HC 601/11 and HC 9527/11 reported as HH 377/13, the applicants had appealed to the

Supreme Court under SC 469/13. The Supreme Court dismissed the appeal and upheld the decision of the High Court in favour of Kennedy Mangenje. (Judgment No. SC13/18).

Pursuant to the dismissal of applicant's appeal by the Supreme Court, Kennedy Mangenje sought to give effect to the judgment of the High Court by now going ahead with the eviction of the applicants from the land in question. It is this ejectment which the applicants challenged on an urgent basis. The grounds were that the ejectment was unlawful on account of the Sherriff seeking to eject them when certain processes had not been properly observed.

The processes observed had been as following. After the dismissal of applicant's appeal in March 2018, the respondent had sued out a writ of ejectment. The writ had been issued out by the Registrar on 29 May 2018. On 1 June 2018, the Sheriff is said to have served the notice of removal and the Supreme Court judgment by affixing them on land owned by the first applicant. Their gripe was that no writ, notice of seizure, notice of attachment, notice of ejectment or High Court judgment was served upon the applicants. They also argued that the Supreme Court judgment had been suspended by virtue of their application for leave to take their matter on appeal to the Constitutional court. It was however a fact at the hearing that leave to do so had not yet been granted.

At the hearing Mr Jera, who was Mr Mangenje's counsel, argued that the matter was not urgent as the applicants were aware of the Supreme Court judgment on 1 March 2018. Having lost the appeal, the implications on applicants was that they were now supposed to comply with the High Court order that they had appealed against. This was also said to have been known to them on this date as indeed their need to act if any. As such it was argued that they should be non-suited for failure to act. Cases cited in support included *Kuvarega v Registrar General & Another* 1998 (1) 188 (H) and *Melusi Ndlovu v PDS Investments (Pvt) Ltd HB* 02/11.

Mr Jera also highlighted that the order of the High Court and the judgment upon which it was based were served on the applicants on 28 March 2018. This was the order that they were to comply with. Clause 6 of the High Court order required the applicants (as respondents therein) to vacate the land within 60 days of the service of the order failing which the Sheriff for Zimbabwe or his deputy and if need be with the assistance of the Zimbabwe Republic Police, was authorised to evict them. It was thereof argued that the applicants were aware at all times when they lost their appeal that they had 60 days within

which to vacate the land. The High Court order having been served on the applicants on 28 March 2018, the 60 days' notice expired on 28 May 2018.

Moreover, it was also argued that the application for leave to appeal to the Constitutional court did not suspend the judgment as the application was still only an application for leave and had not been granted. As such, it was emphasised that there was no appeal but merely a chamber application. The application before me was said to have no merit and the second respondent sought its dismissal. Furthermore, the applicants were said not to have disclosed that an urgent application had already been dismissed by another judge. As such, it was argued that they should further be non-suited for non-disclosure. *Bulawayo Dialogue Institute* v *Matyatya N.O & Ors* 2003 (2) 295 (H)

On their part applicants, through their counsel Mr Kachambwa strongly disputed that the need to act arose on 1 June as claimed. The gist of applicant's response on why the matter was urgent were inextricably linked to the merits of the case. I heard them. Their point of departure was that the unlawful actions complained of that had brought the applicants before the court were rooted in the process which was served by the Sheriff on 1 June. Applicants' counsel zeroed in on the peremptory requirements that it said had not be followed and which formed the basis for bringing the matter on an urgent basis. Four main reasons for arguing that the process was unlawful were isolated.

1. There was no court order empowering the Sheriff to carry out the order.
2. The Sheriff required a writ of execution in terms of r 322.
3. There was no notice of ejectment which contained procedural rights. What had been served was a notice of ejectment.
4. Service at the address was faulty.

Having lent the applicants a careful ear, the finding was that the argument that there was no court order empowering the Sheriff to act on the eviction was simply not correct. The appeal having been dismissed, the order of the High Court arising from its decision passed on 13 October 2013, was the order empowering the Sherriff to act on the eviction. On this issue all counsel were agreed as the order of the High Court and the judgment upon which it was based had indeed been served on the applicants on 28 March 2018.

The second argument was that the Sherriff required a writ in terms of r 322 and that none had been issued. The rule provides as follows:

322. Process for execution of judgment: writ of execution

> The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, **or for ejectment**, **shall be by writ of execution** signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos. 34 to 41.

As this was a matter for eviction, accordingly what was issued was a writ of ejectment date stamped by the Registrar of the High Court and issued to the Sherriff on 29 May 2018. It required him to evict the applicants and all those claiming occupation through him. Applicants attached the writ of ejectment to their application so it was not in dispute that he had a writ of ejectment. Applicants appeared to suggest that it should have been titled a writ of execution thereby missing the point that the various forms applicable writs range from form 34 to 41 in terms of the applicable rule. In other words, there are 8 forms that are applicable to various situations where a writ needs to be issued. In this instance, the appropriate writ to be issued was a writ for ejectment. This was done. Again, the finding at the hearing was that this ground for bringing the matter also lacked merit in this instance.

The third reason for arguing that the process carried out by the Sheriff on 1 June had been fundamentally flawed was that what had been issued was a notice of removal as opposed to a notice of ejectment. Again this argument lacked merit as was pointed out to applicants counsel since the NOTICE OF REMOVAL is worded thus in the relevant section:

> "This is to advise you that in respect of the above case a WARRANT OF EXECUTION/EJECTMENT/DELIVERY has been issued at the instance of the Plaintiff represented by Legal practitioners"
>
> ……

What can be gleaned from the "NOTICE OF REMOVAL" is that it speaks to three possible applicable scenarios. The notice of removal can relate to a warrant of execution; a warrant of ejectment; or a warrant of delivery. In this instance, a warrant of ejectment had been issued out against the defendant(s). That is what was applicable. The parties at all times knew that the dispute was about ejectment. It could not be said that the notice of removal related to execution or delivery. The applicants knew what it about.

This clear wording of the notice was pointed out to applicant's counsel at the hearing and there was no dispute that it encompasses a warrant of ejectment. The court order contained the clear procedural rights that had to be observed before the applicants could be evicted. Essentially, the 60 day period was to have expired before they could be ordered to leave. The time period expired.

The argument about a faulty address also lacked merit. It had a clear link to the first applicant. The address at which the process was served was the first applicants' registered

address for business. There was no proof placed before me that the applicant had changed address and had advised the respondents accordingly prior to this matter.

The order sought was worded as follows:

"TERMS OF FINAL ORDER SOUGHT

That you cause to this Honourable court why a final order should not be made in the following terms:

The execution by the first respondent of a writ of execution issued on 29 May 2018 in Case No. HC 601/11 be and is hereby declared unlawful.

a) The respondents jointly and severally the one paying the other to be absolved shall pay costs of suit.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicants are hereby granted the following relief:

> "The respondents are hereby interdicted from either effecting the removal referred to in the first respondent's notices of removal dated I June 2018 or carrying out an eviction in terms of the writ of ejectment issued on 29 May 2018 in case No. HC 601 /11."

In essence, having heard the applicants, I found applicants' belief that the Sheriff had acted erroneously in order to justify a provisional order being granted, fictitious and mistaken on all the grounds that were argued before me. There was no doubt that their arguments went to the very merits of the order they sought. The applicant's counsel also argued that there would be irreparable harm if the eviction were to go ahead. The real reason for bringing the matter emerged in the certificate of urgency which was that the applicants continue to believe they should not vacate the land in question because they have been on it since 1999. The issue of perceived unlawfulness on the part of the Sheriff when traversed step by step as a reason for bringing the application was a mere smokescreen presumably to buy time for the hearing of the chamber application to approach the Constitutional Court following the dismissal of the appeal by the Supreme Court. The Supreme Court having passed its judgment in favour of the respondent, and there being no matter before the Constitutional Court, the urgent application was essentially clutching at straws. There was no need to clog the roll by referring the matter to the ordinary roll when the reasons for arguing that the

Sheriff erred had been canvassed by the applicants themselves blow by blow as their grounds for bringing an urgent application and had equally been addressed at the hearing blow by blow. There was no *prima facie* and no balance of convenience favouring the applicants. As such the only reasonable outcome, based on what was argued as constituting the Sheriff's errors, was to dismiss the matter.

I dismissed it with costs in a higher scale for the reason that the respondents had been put to unnecessary expense on account of erroneous legal arguments that could easily have been ascertained by legal counsel.

Gama and Partners Legal Practitioners, applicants legal practitioners
Moyo and Jera Legal Practitioners, 2nd respondent's legal practitioners